

# LETTER

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OF A

Gentleman to his Friend,

Shewing that the

## BISHOPS

Are not to be

## JUDGES

IN

## PARLIAMENT

IN

## Cases Capital.

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S I R,

**S**ince you desire that I would let you know my opinion whether or no the Bishops may be present and Vote Judicially in Capital Cases which come to be Judged in Parliament, either in giving the Judgment it self, or in resolving and determining of any circumstance preparatory and leading to that Judgment, I must tell you, that this is now become *Vexata Quæstio*: The two Houses of Parliament having therein been of different Opinions, the House of Peers declaring, that the Lords Spiritual have a right to stay and sit in Court, till the Court proceeds to the Vote of *Guilty* or *not Guilty*, and the House of Commons on the other side insisting, That they ought not to have any Vote in the proceedings upon the Impeached Lords.

And this Difference between the Houses having been the unhappy occasion of *Proroguing* the Parliament, may seem to lay an obligation upon every good English man (if to me your satisfaction were not in the case) as to wish and pray heartily, that these differences may be well composed, that no more Remora's may be to obstruct the proceedings of Parliament, but that the two Houses may joyn with his Majesty to settle this distracted Kingdom, and agree upon, then apply, all necessary remedies (and strong ones they must be) for the prevention of those mischiefs, which the Enemies of the Protestant Religion and of this Government had been long Contriving and Plotting against us, and were now well nigh the achieving and putting in Execution, if God of his Infinite Mercy had not looked upon us, As this I say ought to be every mans wish and prayer, so it cannot but incite every man to satisfy himself and others, where the Right is, and what he ought to have in his wishes: for that Right may prevail, is the natural wish of every good man, but good men many times differ in their apprehensions what is right.

Therefore it deserves a strict inquiry into the Practice of the Parliaments of former times in such matters, and well to consider upon what ground the Prelates were Prohibited having Votes there in Cases of Blood: For that is the Question now before us, What was done heretofore, and what is now to be done in Parliament, that is to say in their Judicial way upon *Tryals* not in their Legislative capacity of passing Acts of *Attainder*, in which I know that Bishops have born a part, but that is not now the question.

Nor do I meddle with the General Question, how far forth Clergy-men in Orders are forbidden having any thing to do with Secular Matters: Nor what in that particular the Imperial Law requires, as that Rescript of the Emperors *Honorius* and *Theodosius*, which Enacts, That Clergy-men shall have no communion with publick Functions, or things appertaining to the Court; Or the Decree of *Justinian*, That Bishops should not take upon them so much as the oversight of an Orphan, nor the Proving of Wills, saying it was a filthy thing crept in among them, which appertained to the Master of his Revenue: Nor what our Common Law of *England* seems to allow or disallow, having provided a special Writ in the Register upon occasion of a Master of an Hospital, being it seems a Clergy-man, and chosen an Officer in a Mannor to which that Hospital did belong, saying it was *Contra Legem a consuetudinem Regni, a non cons. num.* It was contrary to the Law and Custom of the Kingdom, and not agreeable to reason, That he who had

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Cure of Souls, and should spend his time in Prayer and Church Duties should be made to attend upon Secular Employments. I meddle not neither with what seems to be the Divine Law, as having been the Practice of the Apostles, and by them declared to be grounded upon Reason, and to be but what in reason ought to be, which was this, *That they should not leave the word of God and serve Tables*; though that was a Church-Office: and yet they say, it is not reason we should do that, for their work was the Ministry of the Word and prayer, much less then were they to be employed in Secular Affairs.

None of this I say is my business, my task is only to inquire, what the Law of Parliament is in this particular, and what is so, is the Law of the Land. And my method shall be, to run through all the Parliaments that are upon the Rolls in the Tower, and take notice of all the Tryals there Recorded, as well in Cases Capital as in those that were not so, and shew the difference in the Parliamentary proceedings upon them, how the Bishops and Prelates did commonly joyn with the Temporal Lords in judging such as were not Capital (and not yet always so, when the Crimes were of a bigger magnitude) but never but once when the Accusation was for a Capital Crime, which was in the Duke of *Suffolk's* Case. 38. H. 6. when the whole proceeding was so irregular and Unparliamentary, as it is to be wondered at, but certainly never to be followed; it is like the Bird in the Poet, *Rara avis in terris, nigroque similima cygno*, as shall be shewed more particularly, when I take it up in its Order, as it is mentioned upon the Rolls, And so I come to my Narrative.

4. E. 3. Roger Mortimer Earl of March, Sir Simond Bereford, and others were Accused and Tryed in Parliament: and the Roll of that Parliament is so defaced, as it cannot be read; but 28. E. 3. Roger of Wigmore Cousin and Heir of that Earl of March desires that Attainder may be examined; and by the whole proceedings there repeated, it appears, none of the Prelates were present, the words are *Dont le dit Sr. le Roi vous charge Countes, Barons, les Biers de son Roialme, que de si come cestes choses touchent pzincipalement, a lui a vous a a tout le people de son Roialme que vous faciez an dit Roger droit a loial Juggement come affiert a un tiel daver. Therefore our said Lord the King charges you, who are Earls, Barons the Peers of the Realm, that as these things chiefly concern him and you and all the people of the Kingdom, so you give upon the said Roger a right and legal Judgment, as it belongs to such a one to have: Then follows, Les queux Countes, Barons & Biers les Articles par eux examinez revindrent, at. Which Earls, Barons and Peers, having examined the Articles, returned, &c. And gave the Judgment, which was, that they should suffer death: The Bishops cannot be understood to be comprized here under the general name of Peers, since the Barons are first in rank, and besides they cannot pretend to be Peers of the Realm.*

5. E. 3. The Parliament was declared to be called for the redress of the Breach of the Laws, and of the Peace of the Kingdom. Et pur ce que aviz feust a les ditz Bzelatx quil ne attenoit pas ppozement a eux de consailer du garde de la pees, ne de chastierment des tiels malucis, si alerent mesmes les Bzelatx, &c. And because the Prelates were of opinion that it belonged not properly to them to give Counsel about keeping the Peace nor punishing such evils, they went away by themselves, and they returned no more. Et les ditz Countes, Barons & autres Grantz per eux mesmes. And the said Earls, Barons and other great ones went by themselves, and these return, and by the mouth of the Lord Beaumont declare their opiaions, what was to be done, Commissioners to be appointed in every County of the best men (des plus grantz) they to be Gardeins de mesme le Comte, Guardians, or Conservators of the County. These Commissions afterwards brought into Parliament, were read and approved by Justice Sr. le Roi, les Countes, Barons & autres Grantz,

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our Lord the King, the Earls, Barons and other great ones, no Bishops, so much as to hear the Commissions read, because they were to enquire into all Crimes, as well Capital as other the Prelates must have no hand in it.

In the same Parliament Sir John Grey and Sir Will. de la Zouch had quarrelled in the King's presence, Sir John had mis mein au cotel laid his hand upon his Sword, they had been imprisoned, and the business brought into Parliament, Le Roi chargea de par la bouche le dit Dr. Geffrey le Scrape toutz les Countes, Barons & autre Grantz en les soies & ligeances queulx ils devoient au Roi de lui conseiller ce quil devoit faire de si grand excesse fait en sa pzeance. The King by the mouth of Sir Geffrey Scrope charged all the Earls, Barons, and other great ones in their Faith and Allegiance, which they owe him, to give him Counsel, what he ought to do upon such an exorbitancy committed in his presence; they go and consider of it, acquit Zouch, Judge Grey to Prison: Here were no Bishops neither, to Judge so much as of a Battery.

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25. E. 3. The proceedings and Judgment of death against Sir Will. de Thorp Chief Justice, for Bribery, were brought into Parliament, which the King caused to be read dherement devant les Grantz de Parlement pur s'aver ent leur absys, & examine sur ceo chescun aprez auter si sembla a eux toutz, &c. To be read openly before the Grantz, the great men of Parliament to have their advice upon it, and beeing all asked one after another, it seemed to them all, that they were very just, Et sur ceo il fur accorde par les Grantz de mesme le Parlement, que si nul autre tel cas aveigne que nostre Sr. Le Roi pzeigne lui des Grants que lui plaira, pur per leur bon & vis faire ceo que pleise a la Roiale Seignurie, Upon this it was agreed by those Grantz, those Great men of the Parliament, that if any such other case should happen, our Lord the King might take any one of those Grantz those Great men, whom he should please, to do by their good advice what he should think good. It cannot be understood any Bishops were here under the name of Grantz, and to be of the number of those whom the King should take to assist and advise him in such other Judgments of death for the time to come, if occasion were, which could be no employment for Bishops, being to give Judgments of death.

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42. E. 3. Sir John de Lee Steward of the Kings House, charged with several misdemeanors, the Record saith, Et aprez manger vindrent les Prelats, Ducs, Countes, Barons, & aucuns des Comes & illoques feust fait venir Dr. John de Lee, &c. And after they had eaten, the Prelates, Dukes, Earls, Barons, and some of the Commons came, and Sir John de Lee was fetcht thither, &c. The business was there heard, and he was sent to Prison. Here the Prelates were present, for the Crime was not Capital.

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50. E. 3. Several Persons are accused even by the Commons for misdemeanors; and the Bishops present at their Trials and Judgments, as Richard Lyons, who had been Farmer of the Customs; the Lord Latimer who was the Kings Chamberlain, for Oppression in several places in Britain and in England, he was by the Bishops and Lords adjudged to be imprisoned, and put to Fine and Ransom; and then the Commons desired, he might lose all his Offices, and no longer be of the Kings Council, which the King granted. (Yet after this,

51. E. 3. at the request of the Commons themselves, he was restored to all, and declared innocent, which I take notice of by the way.) At this Parliament of 50, William Ellis of Yarmouth, as privy and accessary to the misdemeanors of Lyons; John Peach of London, for getting a Monopoly of sweet Wines; the Lord John Nevil, a Privy Counsellor, for buying some debts due by the King at easie prizes, to make advantage to himself: At all these Trials the Bishops were present, and no body says but they might:

1. R. 2. William de Weston and John de Gomenitz were tried for surrendring Towns and Castles in Flanders to the Kings Enemies; they had put in their Answers, Friday Nov. 22.

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Saturday

*Saturday* they are brought to the Parliament, and Sir Richard le Scrope, Steward of the Kings House, *A commandement de Seigneurs abant-ditz*, By the command of the Lords aforesaid, told them, That the foresaid Lords, (and the Record tells you who those Lords were, rest assavoir, to wit, the Duke of Lancaster, the Earls of Cambridge, March, Arundel, Warwick, Stafford, Suffolk, Salisbury and Northumberland, and the Lord Nevil, Lord Clifford, a plusieurs autres Seigneurs, Barons a Bannerettes eleants au dit Parlement savoient assemblez a abises. Many other Lords, Barons and Bannerets being in the said Parliament had met and advised upon it, from the time they had put in their Answers, and found they were not satisfactory; and then gave Sentence saying, that those Lords had adjudged them to death: First *Weston* was called, and this said to him, and then *Gomenitz*: Here was none of the Prelats named, and it cannot be imagined they should be under the general expression, a autres Seigneurs, Barons a Bannerettes, And other Lords, Barons and Bannerets, after the naming of two Barons, for if there had been Bishops they would have been named before them. Observe likewise, that no Bishops were present from the time that the Prisoners Answers came in, to have Vote, and determine concerning any part of their Answer, Pardon or whatever they had pleaded.

In the same Parliament, and the very next thing upon the Roll is the Case of *Alice Perrers*, accused for breach of an Ordinance made 50 E. 3. against Womens meddling with State Affairs, there the Record saith that she was, fait venir devant les Prelates a les Seigneurs du Parlement pour respondre, Made to come before the Prelates and the Lords of the Parliament to make answer; and then follows, Et sur ceo par commandement des Prelates a Seigneurs le dit *Dr. Richard le Scrope*, rehercea l'Ordinance, And then by the command of the Prelates and Lords, the said Sir Richard le Scrope rehearsed the Ordinance. And then she was heard to the particulars with which she was charged, and at last was adjudged to be banished and forfeit her Estate.

Observe in the Tryal of *Weston* and *Gomenitz*, that only those Temporal Lords there named, had met and considered of the Answers put in by them, as preparatory for the Trial and Judgment, and no Bishop present there: And here in the Trial of *Alice Perrers* which followed immediately after, it is particularly expressed that they were present, and did Vote and Judge as far forth as the Lords Temporal.

*Hunt. 41. 48.* 32 R. 2. The two Merchants that had killed *John Imperial*, a Publick Minister sent from *Genoua*, an Act of Parliament passed to make it Treason, the Bishops had no Vote in the passing of this Act; the Record saith, fait a remembier que cest darrein Act issint faite si fust fait par les Justices en presence du Roy, a des Seigneurs Temporel; en ce Parlement, Memorandum, that this last Act so made was drawn by the Judges in the presence of the King and the Lords Temporal in this Parliament. They were not so much as present when the Judges were in the preparing of it.

*Hunt. 33. 47.* 4 R. 2. Sir *Ralph de Ferrers* arrested by the Duke of Lancaster upon suspicion of Treason, for holding intelligence with the French, brought into Parliament and there tried; Semblant as Seigneurs du Parlement que le dit *Dr. Rauf* estoit innocent: It seemed to the Lords of the Parliament that Sir Ralph was innocent. Can any man think the Bishops were there, and comprised under the general expression of les Seig: i: urs du Parlement? When they were present it is always particularly expressed, as in *Alice Perrers* Case, 1 R. 2. and all those questioned and punished for misdemeanors, 50 E. 3. the Lord *Latimer* and *Lyons*, &c. *Alice Perrers* was fait venir devant les Prelates a Seigneurs du Parlement, was made to come before the Prelates and Lords of Parliament; They were Judged by the Bishops and Lords, the Record saith.

*Hunt. 35. 48.* 7 R. 2. The Bishop of *Norwich*, who had undertaken an expedition into France and not performed

performed the conditions, was charged with several miscarriages and misdemeanours in his employment, and one Crime Capital, which was betraying *Graveling* to the French for ten thousand Franks in Gold, of which yet he cleared himself: Yet that being in for one of his charges, none of the Bishops were present at his Trial, but *Michael de la Pool* gave this judgment, *Le Roi nostre Sr, a bien entendu ce que vous a vez dit, & ent a eu bone deliberation avec les Srs. Temporelz; & semble au Roi & as Srs. Temporels abant-ditz, que vos responses ne sont rien a propos, Parquoy delassent des Countes, Barons & autres Srs. Temporels en cest Parlement est assentuz & accordez que vous soiez en la merci le Roy, & mis a fin & a rancon*, *Our Lord the King hath well heard what you have said, and hath with his Lords Temporal well considered of it, and it seems to him and to the Lords Temporal as aforesaid, that your answers are nothing to the purpose, Therefore by the consent of the Earls, Barons, and other Lords Temporal in this Parliament, it is agreed that you shall be at the Kings mercy, and put to Fine and Ransom.*

The Chancellor likewise gave judgment in the same way that Parliament on *Sir William de Elnham*, *Sir Thomas Trivet*, and others for giving up Holds and Fortresses, and taking money for them.

10 R. 2. *Michael de in Pool* Lord Chancellor was accused by the Commons for several misdemeanours devant le Roy, Prelatz & Seigneurs, Before the King, Prelates, and Lords. Here the Prelates are Judges of misdemeanours together with the other Lords.

11 R. 2. The five Lords Appellants, the Duke of Gloucester, Earls of Derby, Arundel, Worcester, and Earl Marshal making their Protections, that what they attempted touching their Appeals was for the honour of God, safety of the King, the Realm, and their own Lives: The Archbishop of Canterbury for himself and the whole Clergy of his Province entered a Protection, and the Bishops of Durham and Carlisle did the like; That they absented themselves from Parliament, in regard such matters were to be there agitated, but with a *Salvo* to their right: Which some will have to be understood of a right to be present even when those matters were in agitation, and that it was only upon some prudential consideration that they did withdraw: But this could no ways be their meaning, but they protested their having a right to sit and Vote in Parliament upon all other occasions in the general, though upon that occasion they might not be present. The words of their Protection make it evident: *Pro Williamus Cant. Archi-Episcopus pro nobis & suffraganeis Coepiscopis, &c. protestamur quod intendimus & intendi volumus in hoc presenti Parlamento a aliis interesse, Consulere, tractare, statuere, & definire, &c. ac cetera exercere cum ceteris ius intendendi habentibus in omnibus in eisdem statu & ordine nostro semper salvis: Merum quia in presenti Parlamento agitur de nonnullis materiis in quibus non licet nobis alicui eorum iuxta sacrorum Canonum instituta quomodolibet personaliter interesse, eo propter protestamur quod non intendimus nec volumus sicuti de Jure non possumus nec debemus, dum de huiusmodi materiis agitur vel agetur quomodolibet interesse, sed nos penitus absentare, &c.* *We William Archbishop of Canterbury for our selves, our Suffragans and fellow Bishops protest, that we do intend and will be thought so to do, to be present at this and other Parliaments to consult, treat of, and determine, &c. and do other things together with others, who have right to be here in all matters, our state and order always saved unto us entire in the same. But because in this Parliament, some matters will be agitated, at any one of which by the institutions of the Holy*  
Couns.

*Cannon Law we cannot be personally present, we do therefore protest, that we intend not, nor will not, as by the Law we ought not, nor can we in any sort be present, whilst any of those matters are in debate, or coming into debate: but we will absent our selves altogether, &c.* It is plain by the Record, that what they will have to be *Saluum* to them, is their sitting and acting confu-  
lere, a tractare, a statuere, To consult, treat of, and determine in that and all other Parliam-  
ments, when such matters are not in question: But for such matters they say, *Non licet alicui eorum personaliter interesse*, And *de jure non possumus nec debemus interesse*, It is not lawful to be present in person at any of them. and rightly we cannot, nor ought not to be present. Can it then be thought they should lay claim to any right, to what they say *Non licet de jure non possumus nec debemus*, It is not lawful, and by right we cannot, nor ought not? And to say, their meaning was, that by the Law of the Land or Custom of Parliament they might, and that it was only the Cannon Law which hindered them, can have little colour, for the Cannon Law was to them above all Laws, and what was forbidden by that Law they could not have a thought, that it could in any sort be lawful for them to challenge, as their right, upon any account.

It is further observable here, that they profess *Quod de jure non possumus uet debemus, dum de hujusmodi materiis agitur vel agetur quomodolibet interesse*, that is, *all the time that such matters are in agitation*; there is no exception of Preliminaries, and Preparatories, and of being present and having vote during all the debate, till the pronouncing of Sentence, for it is *Dum de hujusmodi materiis agitur vel agitur*, the whole time from the beginning to the ending, and when such businesses are to come on, that is, when they are going upon them, and when they begin. And then consider the close of this Record, *Quelle Protestation leue en plein Parlement, a l'instance & prier du dit Archevesque & les autres Prelatz susditz, est enrolee, pcy en Rolle du Parlement per commandement du Roy, & assent des Seigneurs Temporelz & Communes*, Which Protestation being read in full Parliament, at the instant desire of the Archbishop and other the Prelates aforesaid, is entred upon the Parliament Roll, by the Kings command, with the assent of the Lords temporal and Commons. Which is all the formality of passing Laws in Parliament, that was used in those times, which was only to have it entred in the Roll or Journal Book, that such a thing was agreed upon by the King and two Houses, then it was drawn into the form of a Law afterwards by the Justices and Kings Council, when the Parliament was risen. So as whatever was the Law before, if it were only the Canon Law, it is now come to be the Law and rule of Parliament, and the Law of the Land; but in truth it was so before, and was always so.

20. R. 2. Thomas Haxey Clerk, had preferred a Bill in the House of Commons for regulating the outrageous expences of the Kings House, particularly of Bishops and Ladies, *De la multitude d' Evesques & leur meignee & aussi de plusieurs Dames & leur meignee qui demeurent en l' hostel du Roy, & font a ses coustages*, Of the many Bishops, and their company, and also of many Ladies and their company, that live in the Kings House, and at his charge. The King beeing exceedingly moved at this, some Bishops and Lords were sent to the Commons to let them know it, and to enquire who had made that complaint; the Commons delivered the Bill, and his name who had exhibited it. Haxey was for this tried and adjudged a Traitor, and condemned to death for it. Which Judgment by the way was most unjust, and would not only have shaken, but wholly destroyed the very foundation of Parliament, deterring all Men from the representing there, and seeking redress of any grievance

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grievance publick or private, had it continued in force and unquestioned, but 1 H. 4. it was complained of as erroneous and encontre droit, & la coulse qui avoit este debant en Parlements, Against right, and the course of Parliaments; and therefore Postre Sr. le Roi del aviz, & assent de tous les Srs. Spirituels & Temporels ad ordeigne & adjuggez, que le dit Juggement soit du tout casse, rebersez, repellez, adnullés & tenus de nul force n'effect, Our Lord the King by the advice and consent of all the Lords Spiritual and temporal hath ordained and adjudged that the said Judgment be wholly quashed, reversed, repealed, made null, and held to be of no force nor effect. So this Judgment is damned with Bell, Book and Candle (one may say) and at this the Lords Spiritual were present, and had vote, but not at the trial and condemnation of Haxey, as appears by the Record, which saith, *Fait a remembzer que mesquerdi aprez la Chandelure maintenant aprez le Jugement rendu debers Thomas Haxey Clerc, q; fust ajuggez eu Parlement a la mort come Traiteur, vindrent debant le Roy en Parlement obeir grand humilite l' Archevesque de Cantirbirs & tousz les autres Prelatz, & luy prierent de la grace avoir pitie & merci du dit Thomas & de remittre l' execution, Memorandum, that the Wednesday after Candlemas day immediately after that Judgment was given upon Thomas Haxey Clerk, who was in Parliament judged to die as a Traitor, the Archbishop of Canterbury and all other Prelates came with great humility before the King in the Parliament, and besought his Grace to have pity and compassion on the said Thomas, and to remit his execution, which the King granted. So we see, that after the Judgment given in Parliament, the Bishops immediately came into the Parliament to beg for his pardon, which shews they were not there before.*

21. R. 2. The Commons impeached Thomas Arundel Archbishop of Canterbury of High Treason, and desired he should be put into safe custody; it was answered, that because it touched si haut personne, so high a person, the King would be advised. Afterwards they come and pray that Judgment may be given according to their Impeachment and accusation of him. Sur quoy nostre dit Sr. le Roy, & tousz le Srs. Temporels, & Mr. Thomas le Percy eiant poir suffisient de les Prelatz & Clergie du Roialme d' Engleterre come piert de recozd en le dit Parlement adjuggerent & declarerent cest Article conuz per le dit Archevesque pur Traison, & le dit Archevesque pur Traiteur, & sur ce est agarde qu'il soit banni a ses Temporaltees seisis en main le Roy, Whereupon our said Lord the King, and all the Temporal Lords, and Sir Thomas le Percy being sufficiently empowered from the Prelates and Clergy of the Kingdom of England as appears upon Record in Parliament, judged and declared this Article acknowledged by the said Archbishop to be Treason, and the said Archbishop to be a Traitor, and thereupon awarded him to be banished and his Temporalities to be seised into the Kings hands. Here the the gishops were not present in person, but Sir Thomas le Percy, as their Procurator and Proctor authorized by them, may be said to represent them; and so he did, but yet it shews that the Bishops as Bishops and Clergy men could not be there in their persons, and that rather than they should be there present such an unusual thing should be admitted, as that one Layman, who else was no Peer, nor had place in the House of Peers to vote there, should be chosen by them, to have all their Proxies put together and united in him; to be disposed of by him as he should think good. For it was never done, but in this one Parliament, there never was in no Parliament before or after such a Procuratorship or Proxy given. And in this Parliament of 21. R. 2. it was thrice done, first here to Sir Thomas Percy, then the Parliament being adjourned to Shrewsbury, it was there given, it seems by vote only, to William le Scrope Earl of Wilts, for the words are Sur celes ditz Prelatz &



Clergie nomerent & ordenerent en Parlement per bouche William le Scrope Conte de Wilts, commentant & donnant a luy pleine poir aussi avant & en manere come feust comys a Mr. Thomas le Percy per devant, Hereupon the said Prelates and Clergy named and appointed in Parliament by word of mouth William le Scrope Earl of Wilts, and gave him the same power, as full and in the same manner, as before had been granted unto Sir Thomas le Percy. Now, Percy had it by Commission enrolled; which happily was to make it more authentick, because he was but a Commoner. The third time it was done, was in the business between the two Dukes of Hereford and Norfolk, when by this Parliament sitting then at Shrewsbury, that whole matter was referred to the King, to be by him determined by the advice of certain Lords and Commoners there named, and to them were joyned the Earls of Worcester and Wilts, Procurators for the Clergy. This I must say argues a great unanimity in the voting of the Prelates, which it seems hath ever been, but I must say it was most Unparliamentary, never practised, but in that one Parliament of the 21. R. 2. which whole Parliament is repealed, and all it did Nulled, and made Void by Act of Parliament 1. H. 4. so as it cannot be urged as a Precedent to infer any thing upon it, nor can it make any thing to prove a right in the Bishops of being personally present in matters of that nature, but rather in my opinion strongly the contrary: And one thing more would be observed, which is, that it seems by the Record, that the whole Clergy of England joyned in making this Proctor, and not only the Prelates, who were Members of the House of Peers, which seems very strange. But more than all this, whatever was done this Parliament signifies nothing, the whole Parliament stands repealed by 1 H. 4. and all done in it declared Null and Void.

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1. H. 4. The Commons had desired that Sir Rixhill, ( who had been a Judge in the Common Pleas, and had been sent by R. 2. to Calais to take the Confession of the Duke of Gloucester, who soon after was there murdered ) might be put to answer upon what account he did it: he was under arrest for it; and was brought into Parliament before the King and the two Houses, the Lords Spiritual and Temporal, and the Commons then assembled together: The whole matter was then examined, the conclusion was, saith the Record, Sur ceo chascun Sr. Temporel i steant en plein Parlement examine severement sur la response du dit William, dit quil avoit fait loyalement & quil ny avoit en luy aucun coupe. Hereupon every Lord Temporal being in full Parliament severally asked concerning the answer of the said William, said he had carried himself Loyally, and that he had committed no fault. There was no charge, no impeachment against him, so the Bishops might be, and were present at his examination, as the Commons also were, but they must have no hand in giving any Judgment upon it, because it might have been a preparatory to an Accusation and an Impeachment, if he had not given so good satisfaction, as it seems he did in the account he gave of his employment.

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That Parliament John Hall a Servant of the Duke of Norfolk's, who had helped to murder the Duke of Gloucester at Calais was tryed before the King and the Lord's Temporal: The Record saith, Il sembla au Roy & a toutz les Srs Temporels quil avoit deservi d'avoit si dure mort come la Ley luy pourroit donner, Et sur ceo toutz les Srs. Temporels per assent du Roy adviserent quil seroit treinez del Tower-hill jusques a les fourches de Tyburn, &c. It seemed to the King and to all the Temporal Lords that he deserved as cruel a death as the Law could inflict: And hereupon all the Temporal Lords with the assent of the King gave Judgment that he should be drawn from Tower-hill to the Gallows at Tyburn, &c. there to be hanged, &c.

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2 H. 4. The first Writ *de Hæretico comburendo* was agreed upon only by the Lords Temporal, it was in the Case of *William Sautre*, (our S. Stephen, the Protomartyr of England,) the Record is, *Item cest Pesquerdy un Brief fust fait as Peir & Wiscounz de Londres per advis des Srs Temporelz en Parlement de faire execution de William Sautre, Item this Wednesday a Writ was framed, by the advice of the Lords Temporal in Parliament directed to the Mayor and Sheriffs of London for the execution of William Sautre.* I doubt not but the Bishops and Clergy of those times were the chief promoters of this, though not appearing to be Actors in it: which yet would not have been a direct condemnation of him, as his Judges, nor any thing to be determined by them tending to his conviction, but only an advice given to the King to make it his Act under the Broad Seal to order his execution; yet they then were not to have a hand even in a matter of this nature.

42 Hunt. 49.

The same Parliament the Earls of *Kent*, *Huntington*, and *Salisbury*, the Lord *le Despencer*, and Sir *Ralph Rumley*, who for levying War against the King had been taken and executed, were by the Lords Temporal declared and adjudged Traitors, and their Estates to be forfeited; the names of the Lords that made this Declaration, and gave this Judgment are there set down, the Prince of *Wales* the first, and the Lord *le Scroope* the last, five and twenty in all; Not a Bishop amongst them, so much as to declare and judge it a Treason, though the persons who had committed it were dead before: So as it seems they must not have a hand neither in the Antecedent, what is Preliminary and Preparatory to the death of a Man, nor in the Consequent, what is to be done after, so far from being the Judges to try or condemn him.

Hunt 43. 49

5. H. 4. The Earl of *Northumberland* had Petitioned the King for his Pardon for having, contrary to his Allegiance, gathered Forces, and given Liveries: The King gave this Petition to the Judges to have their opinion of it; the Lords Protested against it, and said, that the Judgment belonged to them, and retained the business, *Et puis lebe & entendue la Petition les Srs. come Piers du Parlement, a queux tielz Jugement appartenent de droit, adjudgerent, que ceo que fust fait per le Conte n'estoit pas traison mes trespasss tant seulement. Sur quoy le dit Conte molt humblement remercia le Roy & les ditz Srs, les Piers de leur droituel Jugement.* And then the Petition being read and understood, the Lords as Peers of Parliament, to whom such Judgments do of right appertain, did give their Judgment, that what the Earl had done, was no Treason, but only a *Trespas*, whereupon the said Earl did most humbly thank the Kings and the said Lords his Peers for their righteous Judgment. Now the Bishops could not be said to be his Peers, which shews they were not there.

Hunt. 26. 40

7 H. 4. A judgment was given much like to that in the 2 H. 4. The King commanded the Lords temporal to deliver their advice concerning the Earl of *Northumberland* and the Lord *Bardolph*, who had been killed at *Bramham-Moor* in *Yorkshire* by the Sheriff of the County, who there with the *Posse Comitatus* encountered them in the Field; There were proceedings against them in the Court of Chivalry after their deaths, upon certain Articles of Treason there exhibited against them. These Articles were brought into Parliament, upon reading of which those Lords Temporal adjudged their Crime to be Treason.

5. H. 5. The Commons, Baillerent une Petition, delivered a Petition, directed Al honorable Prince le Duc de Bedford Gardein d'Engleterre, & as tres sages Srs de cest present Parlement, To the honourable Prince the Duke of Bedford Guardian of England, and to the most wise Lords of this present Parliament, that Sir *John Oldcastle* might be brought before

Hunt 43.

before them, who was indicted and outlawed in the King's Bench for Treason, and excommunicated by the Archbishop of Canterbury for Heresie; and that due execution might be done upon him according to their discretion by authority of Parliament. *Par quoy agarde est per les Srs. avant ditz del allent de le dit Gardein a ala pziere susdit, que le dit John come Traitoz au Roy & a son Roialme soit amenez a la Tour de Londres & dilloques soit treinez parma la cite de Londres as nobelles fourches en la parochie de St. Giles & illoques soit pendus & ars pendant, Wherefore it is adjudged by the Lords aforesaid, with the assent of the said Gardian upon the foresaid Request, that the said John, as a Traitor to the King and his Realm, be carried to the Tower of London, and thence drawn through the City of London to the new Gallows in St. Giles Parish, and there to be hanged, and burnt hanging.* The question is now, if it shall be understood, that under the general expression of *Les Srs.* de cest present Parlement the Bishops were comprized; and so to have been parties in this Judgment, and I conceive not, first, because I observe that generally throughout all the Records and Journals of Parliament almost in all Transactions, but especially and constantly I find it so in matters of Judicature, where they were present, it is always mentioned and expressed so, as *That the Lords Spiritual and Temporal, or that The Prelats, and Earls, and Barons, did so and so,* as it was in the Cases before mentioned of Sir John Lee, Richard Lyons, the Lord Latimer, and the rest, accused of misdemeanours; And my other reason is, that in this particular case of Sir John Oldcastle I find the Clergy had done their parts with him before, declaring him an Heretick, and turning him over to the Secular power, as the words of the Excommunication run, where after having expressed a great tendernefs of the desperate condition of his Soul, and much bewailed his obdurateness, they do condemn him for a Heretick, *Relinquentes eum ex nunc tanquam Hereticum Judicio Seculari, Leaving him from thence forward as an Heretick to the Secular Judgment.* So certainly those good men, I mean those Popish Bishops, would have no more to do with him as to his farther Execution, that the world might see they were not Men of blood.

Hunt. 45. 47  
48.

2. H. 6. Sir John Mortimer had been committed to the Tower upon suspicion of Treason against Henry the Fifth, and made an escape out of prison; being taken again, he was indicted of Treason at Guild-hall: the Indictment by the King's Command was returned into Chancery, then brought into Parliament by the Bishop of Durham, Lord Chancellor, and by him, *Coram Humfrido Duce Gloucestrie* (who in the King's absence was commissioned to call and hold that Parliament) *ac aliis Dominis Temporalibus in eodem Parlamento tunc existentibus fuit liberatum, Was delivered to Humfry Duke of Gloucester, and other the Lords Temporal being then in Parliament* to be by them affirmed, as it was, and Sir John Mortimer then brought before them, and adjudged by them to be drawn, hanged, and quartered: *Et super hoc viso a plenius intellectu Indictamento per dictum Ducem de avilamento dictorum Dominorum Temporalium, ac ad requisitionem totius Communitatis in presenti Parlamento existentium auctoritate istius Parliamenti, ordinatum est & statutum, &c. quod ipse usque ad Turrim ducatur, &c.* And hereupon the said Indictment being seen and well understood, it was by the said Duke, by the advice of the said Lords Temporal, at the prayer of the whole Commonalty in this present Parliament, and by the Authority thereof Ordered and decreed, &c. that he should be led to the Tower, and from thence drawn to Tyburn, and there executed. We see here the Bishops did not offer to advise so much as concerning the Indictment, if it should be admitted of and received by the Parliament,

Parliament, though a Bishop, being Lord Chancellor was by vertue of his Office to bring it out of the Chancery, and present it to the House as he did, and there left it.

28 H. 6. is the sole single President of Bishops being present, and not only so but acting and bearing a principal part in a Judicial proceeding in Parliament in a Case that was in it self Capital, though strangely shuffled off and Justice wholly eluded.

January 22. William de la Pole Duke of Suffolk preferred a Petition to the King, complaining how he was defamed, as if he were other than a true man to the King and the Realm, and desiring that any man would say wherein, that he might give his Answer thereunto. Monday 26. the Commons sent some of their Fellows to the Chancellor, who was Archbishop of York and a Cardinal, praying him that whereas the Duke of Suffolk had that same day in his own declaration confessed, that there was a very heavy Rumor and noise of Infamy upon him, he would let the King know it, that he might be committed to ward after the course of the Law in eschewing of inconveniences that may sue thereupon hereafter (they are the words of the Record.) The next day Tuesday, the Chancellor acquainted the King and the Lords with it, and asked the Lords what should be done upon the Commons request. The Judges were asked what the Law was in this matter; the Chief Justice answered for the rest, that in these general Terms of Slander and Infamy many things may be understood which deserve not imprisonment, but he desired more time to consider of it with his Fellows: The Lords staid not for their return, but all of them from the lowest to the highest were of one opinion, that he should not be committed to ward till the specialty of the matter were declared. Wednesday the 28. the Chancellor and other Lords were sent down by the Kings Commandment to the House of Commons, and the Speaker declared unto them, That seeing special matter was required, they had daily information from several parts of England, that the Realm was sold to the Kings Adversary of France by the Duke of Suffolk, and that he had fortified Wallingford Castle to be a place of Refuge unto them, and this the Commons do think is special matter of Suspicion of Treason laid to his charge, for which he ought to be committed, and therefore it was the desire of the Commons that he might be so, upon which desire he was sent to the Tower. The seventh of February the Chancellor again and several Lords both Spiritual and Temporal were by the Kings command sent again to the House of Commons, and the Speaker William Tresham gave them a Bill containing several Articles of High Treason against the said Duke, which Bill he in their names desired, *Ut in presenti Parlamento inactitaretur, to be inrolled in Parliament*, and the Duke upon it to be proceeded against. The twelfth of February this Bill was read in the House of Lords, and it was thought fit by all the Lords, that the Justices should have a Copy of it, and report their advice what should be done, but the King would have it respited, till he was otherwise advised. The seventh of March next following it was thought fit by the most part of their Lords, that the Duke should then come to his Answer. The ninth of March the Lords were again sent down to the Commons at their request, and another Bill was delivered to them containing certain Articles of Misprisions and horrible Offences committed by the Duke, which they desired might be Enacted in this High Court of Parliament, (so is the expression) and he to be proceeded against. The same day the Duke of Suffolk was brought from the Tower, by vertue of the Kings Writ, into the presence of the King and the Lords Spiritual and Temporal in the Parliament Chamber, both the Bills of the Articles were read unto him, of which he desired Copies; which was granted: and to be nearer at hand to give in his Answer, and come to his Trial, the King by the advice of the Lords committed him to the

Hunt. 44-5



the ward of three persons, Esquires, to be kept in a Tower within the Kings Palace of Westminster. The thirteenth of March he was sent for to come before the King and the Lords Spiritual and Temporal, to answer to his Charge, which he did, denying all of Treason laid unto him and excusing the rest. The fourteenth the Chief Justice rehearsed to the Lords by the Kings Commandment, what had passed the day before, and asked them what advice they would give, which they put off till Monday the sixteenth, and that day nothing was done. Then Tuesday the seventeenth the King sent for all the Lords Spiritual and Temporal, who were in Town, into his innermost Chamber with a Gabel Window over a Cloyster within the Palace of Westminster: The Lords are all named, viz. the two Archbishops, the Duke of Buckingham, thirteen Bishops, six Earls, two Viscounts, two Abbots, the Prior of St. John, and nineteen Barons, who being assembled, the King sent for the Duke of Suffolk, who came, and was upon his knees all the time the Chancellor spake unto him, who by the Kings Commandment remembered what passed at his Tryal, and particularly that he had not then put himself upon his Peerage, and asked him now what he had more to say. The Duke said, that not departing from his Answers and Declarations, he did wholly submit himself to the Kings Rule and Governance to do with him as he list. Whereupon the Chancellor (who, as I said before, was Archbishop of York, and a Cardinal) by the Kings Commandment said unto him, Sir, I conceive that you, not departing from your Answers and Declarations in the matters aforesaid, not putting you upon your Peerage submit you wholly to the Kings Rule and Governance, wherefore the King Commandeth me to say to you, that as touching the great and horrible things in the first Bill comprised, the King holdeth you neither declared nor charged; And as touching the second Bill touching misprisons, which be not Criminal, the King by force of your submission, by his own advice, and not reporting him to the advice of his Lords, nor by way of Judgment, for he is not in place of Judgment, putteth you to his Rule and Governance, that is to say, that you before the first of May shall absent your self out of the Realm of England unto the end of five years, but you may abide in the Realm of France, or in any other Lordships or Places being under his obedience, and you shall not bear malice to any man for any thing done to you in this Parliament. And forthwith the Viscount Beaumont on the behalf of the said Lords Spiritual and Temporal, and by their advice, assent, and desire, recited, said, and declared to the Kings Highness, That this that was so decreed and done by his Excellency concerning the Person of the said Duke, proceeded not by their advice and counsel, but was done by the Kings own demeanance and Rule, therefore they besought the King that this their Saying might be enacted in the Parliament Roll, for their more declaration hereafter, with this Protestation that it should not be, nor turn in prejudice nor derogation of them, their Heirs, nor of their Successors in time coming, but that they may have and enjoy their Liberties and Freedom as largely as ever their Ancestors or Predecessors had and enjoyed before this time.

I have been the more large in this account, which I have given of this Trial, marking out every step of the proceedings in it, that whosoever reads it may see how irregular and extravagant it was from the beginning to the end, from the Commons first desiring that the Duke of Suffolk should be committed upon so slight a ground as his complaining in the House of Lords, that he was ill spoken of and defamed, to the close of all, the Judgment given by the King by the mouth of the Chancellor for his Banishment, in regard he had not put himself upon his Peerage, which yet the Chancellor said the King did not do as his Judge, for that he was not in the place of Judgment. And it was an odd thing and unusual, that some Prelates and some Lords should be sent down



to the House of Commons to receive the Articles of this Impeachment. All this was such a Hodg-podg of a Trial, as no man can tell what to make of it, nor can it be of any signification to be a President and a Rule of proceeding in matters of that nature in Parliament.

But admit it had been never so regular, it is but one single President of Bishops and Prelates acting in a Judicial Capacity in a Capital Cause in Parliament, against multitudes excluding them; it was once so and never but once: And can that be thought sufficient to alter and change the constant course of practice of Parliaments, which hath been otherwise? Had it been questioned then, and upon a debate and mature consideration, been so resolved at that time, this had signified something; but it was done and no exception taken, which they call a passing *Sub silentio*, and more, it was never done but once. But Sir *Edward Coke* goes further and saith, that two or three Presidents are nothing, if forty be contrary and so it is here; he tells you too, when it is that they signifie nothing; that is, *Quand les Presidents passent sans challenge del partie ou debate des Justices, When they be not challenged by the Party concerned or not considered of, and debated by the Judges*, as neither of them was here done, it is in *Slade's Case* in the 4 Reports. It is a Rule in Law, *A facto ad jus non valet argumentum*, but it may withal be said and truly, *A sepe facto ad jus contra semel factum valet argumentum*. Upon the whole matter one may boldly affirm, that this President of 28 H. 6. is no ground for the Bishops to build their claim upon, of having a right to sit and vote in Parliament in Capital Causes.

31 H. 6. is the Earl of *Devonshire's Case*, the Record runs thus. *Be it remembered that where the 14. day of March the said 31 Year of this present Parliament, Thomas Earl of Devonshire upon an Indictment of High Treason, by him supposed to be done against the King's Honourable Estate and Person, afore Humphrey Duke of Bucks, Steward of England for that time assigned, and of the same Treason by his Peers the noble Lords of this Royallme of England being in this said present Parliament, was acquitted of all things contained in the same Indictment.* Now I suppose no man will say, That the Bishops were either his Peers, or Lords of the Realm.

38. H. 6. The Lord *Stanley* was accused by the Commons for being in confederacy with the Duke of *Tork*, and they desire he may be committed to Prison; the Answer is, The King will be advised; which is all was done: And this is the last president of any impeachment, or of any Person questioned in Parliament in a Judicial way, that is upon the Rolls in the Tower.

And I do not remember that I have read or heard of any Trial in Parliament in a Judicial way since that time till the E. of *Straffords* in our memory, whose Trial was completed in that way, but he was attainted and condemned by the Legislative power; During all the Trial, from the beginning to the end, the Bishops were never present at any part of it: And it yet appears upon the Journal Book of the House of Peers, though many passages be razed, but this is not, *That upon the 9. of March 1640. upon a Report brought in by the Lord Privy Seal of something concerning that business, and a debate arising upon it, the Bishops withdrew, it being an agitatione cause sanguinis.*

It is true, there was in that same Parliament the February before an Impeachment of High Treason brought up from the House of Commons against the Lord Keeper *Finch*, but it never came to Trial, for he fairly ran away, and got beyond Sea, whereupon by the Order of the Lords Temporal, a Proclamation was issued forth for him to appear the 10. of March following: the words of the Proclamation are, *Rex Vice-comiti, &c. Cum Communitas Regni nostri Anglie in presenti Parlamento Johannem Dominum Finch de Fozdich nuper Custodem Pagni Sigilli Anglie de Alta Proditione accusaverit*

accusaverit & impetierit, Cumque per Dominos Temporales in eodem Parlamento de assensu & abbasamento nostris Ordinatum existit, quod Proclamatio per totum regnum nostrum Anglie publicie fiat, qd. idem Johannes Dominus Finch in propria persona sua compareat, & se reddat coram nobis & prefatis Dominis, de iure die Martii proxime futura ad respondendum & standum recto coram nobis & prefatis Dominis ex hac parte: Pos volentes, &c. *The King to the Sheriff, &c. Whereas our Commons of this our Kingdom of England have in this Parliament accused and impeached John Lord Finch of For-dich, late Lord Keeper of the Great Seal of England, of High Treason, And whereas the Lords Temporal have in the same Parliament with our consent and advice Ordered a Procla-mation to be published throughout our whole Kingdom of England, that John Lord Finch do personally appear and yield up himself to us and the foresaid Lords, upon the 10. of March next following, to answer for his Treason, and stand to the Judgment of us, and the foresaid Lords in that behalf; We willing that the Order have its due effect, do command and strictly en-joyn you, that upon the receipt of these presents, yo do in all Cities, Market Towns, and such other places within your Bayliwick, as to you shall seem expedient, cause in our name to be pub-licly proclaimed, That John Lord Finch do appear in person and render himself before us, and the foresaid Lords in this present Parliament, upon the 10. of March aforesaid, to answer for the Treason aforesaid, and stand to the Judgment of us and the foresaid Lords in that behalf, according to the tenor of the foresaid Order.* This was the Proclamation, Ordered to be made only by the Temporal Lords, and no Bishops present, yet was it no part of the Trial, but merely a course taken to have him in Court, that he might be tried. But be-cause it looked towards a Trial, the Bishops must have no hand in it.

And it is farther observable in this president, that the Kings learned Counsel was ordered to draw up this Proclamation according to the ancient Parliamentary way; which shews that it was the antient Parliamentary way, That only the Lords Temporal should be interested in such Proceedings, and have the ordering of them, and not at all the Bishops.

And I can give you an ancient President out of the *Placita Parliamentaria* in the 33 of *Ed. 1. Nicolas de Segrave* being with the King in an Expedition into Scotland, had a quarrel with *John de Crumbwel*, left the Kings Army, and went to fight with *Crumbwell* in France: He was for this by the Kings command at his return summoned to appear in Parliament, which he did, *Venit in pleno Parlamento in presentia ipsius Domini Re-gis, Archiepiscopi Cantuariensis & plurimorum Episcoporum, Comitum, Baronum & aliorum de Consilio Domini Regis tunc ibidem existentium, He came into the Parliament before the King, the Archbishop of Canterbury, and many other Bishops, Earls, Barons, and others of the Kings Counsel there present.* The business is opened before them by *Nicolas de Warwick*, who charged him with leaving the King amongst his Enemies, and doing what in him lay to expose him unto their Power; whether the Bishops continued in Par-liament to hear this, appears not by the Record, but it appears clearly, that they were not to meddle in it, not so much as to advise upon it, for it follows, *Et super hoc Do-minus Rex volens habere abbasamentum Comitum, Baronum, Magnatum & aliorum de Consilio suo, inunxit eisdem in homagio, fidelitate & ligancia quibus ei tenentur, quod ipsum fideliter consulerent qualis poena, pro tali facto sic cognito fuerit infligen-da. Qui omnes habito super hoc diligenti tractatu & abbasamento consideratis & intellectis omnibus in dicto facto contentis, & per predictum Picolaum ple-ni & expresse cognitis dicunt, Quod huiusmodi meretur penam amissionis vite,*

The King willing to have the advice of the Earls, Barons, and other great men of his Counsel, enjoined them upon the Homage, Fidelity, and Allegiance which they owe him, to give him faithful Counsel, what punishment was to be inflicted upon such a crime so confessed, who all upon a serious debate and advising upon the matter, and well weighing all the particulars of it, and what was by the said Nicolas expressly acknowledged, *de-jay*, That such a man deserved to lose his life, but the King pardoned him afterwards. Still you see Bishops are not so much as advised withal in a Case of Life and Death.

This we see hath been the usage in Parliament all along, since the Journals and Records can give us any light of what was there done. And out of History I can go further, and cite you an ancienter Precedent than all these: In *Edward* the Confessor's time, who in a Parliament convened in *London*, as *Brompton* relates it in his Chronicle, *Col. 937.* upon Earl *Godwin's* appearing there, who was said to have formerly murdered *Alfred* the King's Brother, presently cried out, *Proditor* Godwine, ego te appello de morte *Alfredi* fratris mei, quem proditori- naliter occidisti, cui *Godwinus* se excusando respondit, Domine mi Rex, salva reverentia & gratia vestra, pace & dominatione, fratrem vestrum nunquam prodidi nec occidi, unde super hoc pono me in consideratione Curie vestre. Tunc dixit Rex, Carissimi Domini Comites & Barones terre, qui estis homines mei legiti hic congregati, & appellum meum responsum- que *Godwini* audistis, volo quod inter nos rectum judicium decernatis, & debitam justiciam faciatis. Comitibus vero & Baronibus super hoc ad invicem tractantibus, &c. Thou traitor *Godwin*, I do accuse thee of the death of my Brother *Alfred*, whom thou didst treacherously kill; whom *Godwin* answered, excusing himself, My King, with reverence to your Grace, and to your Government, and with your good leave, I have not used treachery to your Brother, nor have I killed him, and of this I refer my self to the Judgment of your Court. Then the King said, Dear Lords, Earls, and Barons of the Land, who are my Liege People here assembled, you have heard my Appeal, and *Godwin's* Answer, I will have you to decree righteous Judgment betwixt us, and to do that justice which ought to be done. And the Earls and Barons debating this among themselves, some were of one opinion, some of another, and at last they agreed to offer the King a great sum of Money, and to beseech him that he would take off his displeasure from Earl *Godwin*, and pardon him. The Historian adds, Quorum considerationi Rex contradicere nolens, quicquid judicaverant, per omnia ratificavit, Whose opinion the King not willing to contradict, agreed to, and ratified all that they had done. Here we see it was only *Ad Comites & Barones* that he appealed, and they were only to Judge of it, and no Bishops nor Prelates.

But some I hear alledge a Precedent in 11 H. 2. of Archbishop *Becket*, who was at a great Council, *Solemne Consilium*, at *Northampton* accused of Treason, and other misdemeanors, where Bishops were his Judges, as well as Temporal Lords. This they fetch out of Mr. *Selden's* Titles of Honour, who cites for it a Manuscript made by a Monk, called *Stephanides*, or *Fitz-Stephen*, and there it is said, that the Archbishop was accused *Leſe Maſteſtatis Regie Corone*, quia est a Rege citatus in causa *Johannis*, neque venerat, neque idone se excusasset, Accused of Treason because being summoned by the King in the Cause of one *John le Mareſchal*, and he neither came himself, nor sent a sufficient excuse, and that for it he was sentenced to forfeit all his Moveables, and that the Lords and the Bishops could not agree upon pronouncing the Judgment, they putting it off from one to the other, and that at last the King commanded the Bishop of *Winchester* to do it: This is what that Manuscript saith. But none of the ancient Historians of those times say any thing of his being accused of Treason. And which makes it the more unlikely, is, that it was soon after that solemn ratification of the Constitutions of *Clarendon*, which all both Bishops and Lords, had sworn to observe for ever, declaring them then to be the Law of the Land, and to be Consuetudines & Libertates antecessorum suorum, The Customs and Privileges of their Ancestors, (which makes me say, it was rather a De-

Hunt. 54

Hunt. 61

clarling what was the Law before, than making a new Law; though what was then done, was sufficient to make it a Law, if it had not been so before: And one of these Constitutions was, that the Prelates of the Church should not *Interesse iudicii Curie Regis, Be present at the Judgments given in the King's Courts*, when loss of Members or Life was in question. This great Council or Parliament was in February at *Clarendon*, and the other at *Northampton*, was in *October* following; so it is not likely they should so soon forget, and do contrary to what they had bound themselves to solately by a solemn Oath publickly in open Parliament: And I think one may modestly affirm, that it was a mistake in the Writer of that Manuscript to say, That the Archbishop was then charged with Treason: *Gervasius Dorobernensis* saith, he was charged with two things; one, not doing Justice in his Ecclesiastical Court to one *John*, (who was *John the Mareſchal*, that complained of the Archbishops detaining some Land from him;) the other, That being sent for by the King upon occasion of *Mareſchal's* complaint, he came not: The first he excused, laying the fault upon *Mareſchal* himself for abusing the Court, bringing *veterum cantuum codicillum, an old Song-Book*, to swear upon, and refusing to swear super *Evangeliū, ut moris est, upon the Evangelists, as the Custom is*, whereby he said he did *Curiam suam infamare, Defame his Court*. The other he answered, proving by two sufficient Witnesses, *Per duos legales viros*, that it was sickness hindered him, and not any contempt. This is the account which *Gervasius* gives, and saith not a word of any Treason; neither doth *Matthew Paris*, nor *Roger Hoveden*, who both of them give a relation of that proceeding at *Northampton* against the Archbishop. And to say the truth, it would be a strange High Treason, only not to come being sent for by the King, though there had been no sickness in the case, at most it could have been but a High Contempt, and punishable by Fine and Imprisonment, or the like; and probable it is, that *Fitz-Stephen*, who was a Creature of the Archbishops, might represent it so, only to draw more *Odium* upon the King for his severity against the Bishop, even to an injustice, when in truth there was no such thing. However we may look upon it, as but a weak Precedent for the Bishops to lay any weight upon to prove their right to sit, and vote, and judge in a Capital cause, *Causa sanguinis*, being at the best but out of a blind Manuscript of an Author justly suspected of great partiality, against the tenour of all the ancient Writers that give an account of the same business.

But we must go a step further to clear this matter in question, for it seems some of the Bishops do say, That though they will have no part in the Condemnation and pronouncing Judgment upon a Criminal person, as to loss of Life or Member, yet they may and will vote and Judge in such things as are but Preliminary and Preparatory to that condemnation, and yet think they have no hand in blood, though they have a hand in doing that, which will infallibly cause the taking away of a man's Life; and shedding of his Blood, so they would divide two things which in truth have so near a relation and dependency the one upon the other, as they are only separated by a little time coming between; one thing to be done first, and that being done, the other must necessarily follow, and be done presently after: And they doing the former, may be well said to do the latter; and if any Law prohibit them from having to do with the latter, the same Law doth and must prohibit them meddling with the former. It is a rule in Logic, *Causa causa est causa causati*. If the Judgments of the Bishops determine one thing, which is the necessary cause of any other thing, their Judgment may be said, and really it doth determine the other thing.

As take for example the particular case upon which this Question hath been moved, the Earl of *Dauby's* Pardon, of the validity or invalidity whereof they will be Judges: It is hoped they will be just Judges, and incline neither way, but according to the merits of the Cause before them, so what their Judgment will be, till they have heard all, themselves cannot tell. Now, if by their Judgment the Pardon be determined to be invalid and illegal, and that

carry

Hunt. 67.

Hunt. 119.



carry with it a conviction of the Crime of which he stands impeached (as some will have it to do, saying, That the taking of a Pardon implies a guilt, and is in Law a confession of the Crime pardoned) and so his condemnation must necessarily follow even for Treason, the impeachment being so, doth not their Judgment subje<sup>t</sup> him to that condemnation? How then can they say, we will have no part in,condemning him? Is not this something like the Frier in *Chaucer*, that would have, of a Capon the Liver, of a Pig the Head, yet would that nothing for him should be dead: So they forsooth will take upon them to Judge his Pardon to be no Pardon, which brings on infallibly his condemnation, and yet say with that Frier, God forbid he should die for us, That we should have any hand in his blood: But certainly this will not pass for currant either in *Foro Judicii*, or *Foro Conscientie*, to excuse them from being Actors in his Condemnation.

To evade this, some say the Bishops may be present, and hear what will be said *Pro* and *Con* concerning this Pardon, and those only shall deliver their opinions and judgments of it, who are satisfied of the Validity and Legality of it, but those amongst them who are of another mind, shall withdraw and give no vote, and then it cannot be said that any of them have a hand in condemning him. But how this will sute with the Office of a Judge let any man judge, whose duty it is to condemn the Guilty, as well as to acquit the Innocent, and who ought to do the one or the other in every business that comes before him, as he finds ground for it upon hearing the Allegations, and Proofs: And besides, it is most Unparliamentary; for in Parliament all who are at the debate of a business, ought to give their vote to the Question one way or other, according to their sence of it, and as they in their Consciences think it just.

But to break thorough all at once they will have it, That it is only by the Canon Law that this restraint is upon them, and that the forbearance of their Predecessors being Papi<sup>sts</sup>, and so subje<sup>t</sup> to that Law, was only in that respect; which Law being of no force at present, and taken away by Act of Parliament, they are now at Liberty, though in modesty they think fit sometimes to withdraw, but have a right to continue sitting, if they please.

To which in answer I shall say, that I will not deny but that the Canon Law might give the first rise, and a beginning to such an usage, and no Law could be of greater force to introduce and establish such a thing, as being that to which only the Clergy of those times would be subje<sup>t</sup>, conceiving themselves to be above, and not bound by any other: But it is most clear, that it came afterwards to receive a Civil Sanction, and to have not only the stamp of the Authority of Parliament set upon it by the continual practice there; and we know that *Consuetudo Parliamenti est Lex Parliamenti*, *The Custom of Parliament is the Law of Parliament*: But that two several times there have been particular and express Confirmations, and Ratifications of it in Parliament, which makes it a Statute Law of the Land, as much as any other can be, which we have in our printed Statute Books.

The first time was at a Great Council, which was then their Parliament, at *Clarendon*, about the 10 of *H. 2.* where were made that which they call the *Constitutions of Clarendon*, which were not new things then first made, but a recapitulation of some things that had been in use and practice in former times. *Matthew Paris* and *Gervasius Dorobornensis* recite them at large, other ancient Historians more succinctly: There were of them sixteen in number: *Matthew Paris* gives the best account of them, and of the whole proceeding in that affair. He tells you, how the Archbishops, Bishops, Abbots, Priors, Earls, Barons, and other great ones *alii Proceribus* being present, *Facta est Recognitio, sive Recordatio partis Consuetudinum & Libertatum antecessorum suorum*, *A Recapitulation or a Rehearsal was made of the Liberties and Customs of their Ancestors* in the time of *H. 1.* and of other Kings; so it was not a new Law, and but then enacted, but it was indeed a Declaration of what was the Law before,



yet then more solemnly enjoined, *In regno observari & ab omnibus teneri, To be in the Kingdom observed and kept by all men*: and this in regard of differences oft times arising between the King's Justices and the Clergy, *Propter dissensiones & discordias saepe emergentes inter Clerum, & Justiciarios Domini Regis*, that Popish Clergy being still apt enough to encroach upon the Civil power, which made it the more necessary to revive, and re-establish the old Law and Custom of the Kingdom. Sixteen Articles were then agreed upon, one of which, the eleventh, runs thus, *Archiepiscopi, Episcopi, & universae Personae Regni, qui de Rege tenent in Capite, habeant possessiones suas de Rege, sicut Baroniam, & inde respondeant Justiciariis & Ministris Regis, & sequantur, & faciant omnes Consuetudines Regiae. Et sicut ceteri Barones, debent interesse Judiciis Curiae Regis, quousque perveniantur ad diminutionem membrorum vel ad mortem*: *The Archbishops, Bishops, and all the dignified Clergy of the Land, that hold of the King in Capite, shall hold their possessions from the King, as a Barony, and answer for their Estates unto the King's Justices and Ministers, and shall observe and obey all the King's Laws. And together with the other Barons they are to be present at all Judgments in the King's Courts, till it come to require either loss of member or life.* And this Article as well as the rest they are sworn to observe. See how the Author expresseth it, *Hanc Recognitionem sive Recordationem de consuetudinibus & libertatibus iniquis Archiepiscopi, Episcopi, Abbates, Priores, & Clerus cum Comitibus, Baronibus, & Proceribus cunctis juraverunt, & firmiter in verbo veritatis promiserunt viva voce tenendas & observandas Domino Regi & heredibus suis, bona fide, & absque malo ingenio in perpetuum*, *This Recognition or Recordation of these wicked Customs and Liberties did the Archbishops, Bishops, Abbots, Priors, and the whole Clergy, together with the Earls, Barons, and all the Great men swear to, and firmly promise upon the word of truth, by word of mouth, that they should be kept and observed to the King and his Heirs in true faith, without any evil meaning for ever.*

Now, can there be a more solemn establishing, and a stronger confirmation of any Law to have it inviolably observed and obeyed by the whole Nation than this we find here? where besides the authority of the Parliament, (for these great Councils were the Parliaments of those times) there is an Oath, which is the greatest Obligation that mankind is capable of, making even God a party to it, to see it obeyed, and punish the transgressors. And from whom have we the testimony of these transactions, to assure us of the matter of Fact? From *Matthew Paris* a Monk, one that would not be partial for the Lords Temporal in relating matters to give them more power in Judicature, and less to the Lords Spiritual, than of right belonged to each, and looking upon this exclusion of the Prelats from the power of Judging in such cases, to be some diminution of their Omnipotency, which they were so ambitious of, he therefore ranks it amongst the *Consuetudines iniquas, the wicked Customs of the former times*. So we have here *Testimonium irrefragabile an irrefragable and invincible testimony*, upon which we may build our faith, and have a certain assurance that there was really such an usage in ancient times, and that it was then in that 10 year of H. 2. again ratified and confirmed, since these Monks have so recorded it, and transmitted it to posterity.

The second time that this received a Confirmation in Parliament was the 11 of R. 2. which I mentioned before, when the Arch-bishop of Canterbury and the other Bishops upon their withdrawing then from the Parliament, in regard matters of Blood were to be there agitated, and determined, *In quibus non licet alicui eorum personaliter interesse*, as they say, *In which it was not lawful for any of them to be present in person*, did therefore enter a Protestation with a *Salvo* to their right of Sitting and Voting in that and all other Parliaments, when such matters were not in question: which Protestation of theirs was at their desire enrolled in full Parliament (as the Record saith) *Par commandment du Roy, & assent des Seigneurs Temporels & Communes, By the Kings command with the assent of the Lords Temporal and Commons.*

So indeed it was here a perfect and compleat Act of Parliament, and if it had not been a Law before, would then have been made one.

But it was a Law before, and this needed not, to make it more a Law than it was before; yet certainly what was here done must be of some signification, and add some weight, that it may be said at least, that it seems to enforce some greater compliance with it, and to heighten the offence of such as will not conform to it.

And by the way, let me desire to be well understood what I mean by saying, This would make it a Law if it was not one before; I do not mean the Protestation would be a Law: for a Protestation *Modo & Forma* cannot be a Law, but the subject matter of it was then enacted; which did consist of two Particulars, the one, That the Prelates had a Right and a Privilege to Sit and Vote in Parliament in all other businesses; the other, That they had no Right, nor was it lawful for them to be present in Parliament, when such businesses were in question: Which one would think they might look upon as a Right and Privilege, to be exempt from being obliged to attend in such Cases, Cases of Bloud: As the Lords Temporal, who are Peers of the Realm, and challenge it to be their Right and Privilege not to be returned in Juries upon the Trial of Commoners. Though to speak the truth, I doubt those Prelates did not much desire this Privilege, but the *Salvo* to their Right of Sitting in all Parliaments to have been what they aimed at most in their Protestation, and which they would have to be enrolled; but the one could not be without the other; and upon no terms would they admit the least scruple should be of their Right to Sit in Parliament, which their withdrawing at that time might seem else to call in some question as they thought, and therefore they would make that Protestation; For that Popish Clergy was very ambitious, and loved to have the rule over all persons and things; we see it by *Matthew Paris*, how he branded those Constitutions of *Clarendon*, with terming them *Consuetudines iniquas*; and the Archbishop *Becket* himself after he had sworn to them, repented him of it, and enjoyned a severe Penance to himself, and suspended himself from the Office of the Altar for several months, till he had the Pope's Absolution. This makes me doubt if the Clergy was of another mind in *Richard* the Second's time, and if they could not have been well enough contented to have continued Sitting as Judges in all Cases, if the Canon Law had not debarred them, but that being they would make that Protestation, consisting, as I say, of those two parts, both which being so approved of by the Parliament, and there enrolled, became then, and so continue to be, the Law of the Kingdom: For in those times all Laws were so made: Only the substance of the Law was agreed upon in Parliament, by King, Lords, and Commons, and entred in the Journal Book; And the King's Justices did afterwards draw it up into Form, and then publish it to be the known standing Law of the Kingdom. But that was not needful here, because it was not a new thing, that did then receive its first being. Neither, I say, was it new before in *Henry* the Second's time, it appearing by what was then transacted, that it was in usage in *Henry* the First's time, only it was ratified in that Great Council of *Clarendon* under *Henry* the Second with a little more solemnity, and the addition of an Oath for the better observance of it. And we may carry it yet a little higher to *Edward* the Confessor's days, as appears by his Appeal against *Earl Godwin* in a Great Council, which was their Parliament; and how long it had been the use and practice before that, God knows.

In E. 4th time, it was the declared Law of the Land, you have it in the Year-Book of 10 E. 4. Term. Pas. n. 35. The words are, Quant un Sr. est cundite ceo serra maunde en le Parliament & la le Seneschal d'Engleterre le mettra a respondre & il dira De rien culpable, & se sera trie per Pares suos, donque les Seigniors Espirituels, que ne poient consent al mort de home, ferraont un Procurator en le Parliament & donque le Seneschal doit examiner pimes le plus puisne Seignior que est, si soit culpable, & issint separaſim a toutes les.

Les Seigneurs queux sont la, &c. When a Lord is indicted, it shall be returned into Parliament, and there the Steward of England shall put him to answer, and he shall say, Not guilty, and this shall be tried by his Peers, and then the Lords Spiritual, who may not consent to the death of any man, shall make their Procurator in Parliament, and then the Lord Steward shall ask the youngest Lord, if he be Guilty, and so severally all the Lords that are there, &c. This I alledge to shew that even by the Law of the Land, the Bishops cannot be Judges in a Case Capital: It is true here is mention made of their making a Proctor, which was ~~Error~~ *Temporis*, the *Error* of those times, grounded upon what was so lately done, (as they looked upon it) though irregularly done in the last Parliament of R. 2. whom they considered as their last lawful King; and in truth he was so, the three *Henries* that came between being but Usurpers; and therefore they had, it seems, a deference for what was then done, though as I have already said, it was never done before, nor is it in truth a thing very practicable, and not at all Parliamentary, to have one man, or two men (as we see it was also done that Parliament,) represent the whole Bench of Bishops. And more than all this (as I have already observed, which it seems, was not then thought of) that whole Parliament of R. 2. stands repealed, and all that was done in it declared by a subsequent Act of Parliament to be Null and Void. But this is but by the way; my intent in quoting this Book-Case, is only to shew that the Bishops were not excluded Judging in Capital Cases by the Canon Law alone, but that the Law of the Land did likewise confirm it, and the Courts of *Westminster* did so conceive of it.

So I think I may well conclude, and with some confidence affirm, That Bishops now are not to be Judges to Sit and Vote in Parliament in any Trial, or part of a Trial, that is, in any circumstance, which doth any ways lead or conduce to such a Trial of any Capital Offender, but the whole Judgment is singly and wholly in the Lords Temporal, and to them only such Judgments do belong, as was challenged by them in the Case of the Earl of *Northumberland*, 5 H. 4. and is so declared to be in several other Cases upon the Rolls of Parliament. And having thus delivered you my opinion, and my grounds for that opinion, I submit it to your judgment and rest;

S I R,

Your Humble Servant.

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POST-

# Postscript.

SIR,

**A**S I was closing my Letter, two Papers were brought me, one in Written hand, the other Printed, which maintain an Opinion clean contrary to mine; I shall tell you what they say, and give my Answer to it, then leave it to you to determine, who is in the right.

The written Paper, to prove their right of Judicature in all Cafes, none excepted, declares Bishops to be Peers of the Land, and a Third Estate in Parliament, and therefore are not to be excluded from being Judges in all Cafes, as well Capital as other.

To prove them Peers of the Land he urges Statute Law, and Common Law; for the Statute Law, he alledges the 25 of *Ed. 3. c. 6.* and the 4. of *Hen. 5. c. 6.*

First, For the Statute Law, let me tell you, It is not every expression *Obiter* upon the By, that is in the Preamble of a Statute (as this is of Bishops to be called Peers in these Statutes) that makes a thing pass for Law, except it be by way of Declaration, declaring it to be a Law, or reciting it as a Law before made: And then I shall shew you how these two particular Statutes run, and what they are. That of the 25 of *Ed. 3.* it is true, hath in the Preamble, that the Prelates had prayed the King, that their Temporalities thenceforth might not be seised upon for such contempts, sith they were Peers of the Land, that is, by their own sayings they were Peers, for so it was only, the Statute doth not make them so. The Record is, that among the Petitions of the Clergy, one is *Come Evevesques & Chevesques tiegnent leur Temporaltees du Roi en Cheif & pertant sont Pieres de la Terre, come sont autres Countees & Barons, quil vous pleisse a eur graunter que nul Justice pur soul contemptz puisse despoiermes leur Temporaltees faire prendre, &c.* Seeing Archbishops and Bishops hold their Temporalities of the King in Capite, and therefore are Peers of the Land as are other Earls and Barons, that you will be pleased to grant unto them, that no Judge may henceforward for meer contempts cause their Temporalities to be seised: The Answer is, That the Law is so, and cannot be changed, but the King is willing that in such Cafes a reasonable Fine may be taken. So you see they indeed call themselves Peers, which the King takes no notice of in his Answer, but speaks to the matter of their Petition; and even in his Answer intimates, that they are not in the same condition with Earls and Barons; for he saith the Law is so for them, that is, that they should forfeit their Temporalities for such Contempts, which no man will say was the Law for Earls and Barons to forfeit their Lands for any Contempt, but well were they liable perhaps to pay a good Fine for it: So then I may say that those Bishops were a little mistaken, to affirm that they were Peers of the Land just as other Earls and Barons are.

The other Statute is of the 4 *Hen. 5.* and is only concerning *Ireland*; it saith, That by a Statute in *Ireland*, no Irishman was to be preferred to any Dignity in the Church, and yet some were made Archbishops and Bishops, and they make their Collations to *Irish* Clerks, then follows, *And whereas they are said to be Peers of the Parliament in the same Land, they bring with them Irish Servants to Parliaments and Councils, who give intelligence to the Irish Rebels.* That Statute.



Statute is now confirmed; And what this makes to prove the *English* Bishops Peers of the Land, I see not, nor I think no body else can, at most it can but declare them to be Peers of the Parliament of *Ireland*, and it is too, even for those *Irish* Bishops, but that they are so said to be, that is, said to be Peers, not that they are so.

But to prove that they are not Peers of *England*, I think we have a better Law, even *Magna Charta* it self; it saith, That every man who is tried at the King's sute must be tried by his Peers: Now if a Bishop be tried for any Capital offence, he is tried by the Commoners, and that is the Common Law of the Land, it hath ever been so, never otherwise; then must Commoners be his Peers, and he and Commoners must be *Pares*. The Great Charter of *England's* Liberties *Magna Charta* declares them so; A Temporal Lord, Duke, Earl, or Baron cannot be Judg in the Case of a Bishop, except it be in Parliament, where the Temporal Lords be the sole Judges, and those to whom Judgment doth properly belong: nor on the other side can any Bishop be their Judg, how then can they be said to be *Pares*, Fellow Peers? For my part I see not.

Then for their being a Third Estate in Parliament (for which that Writer alledges Mr. *Selden's* authority) is a thing so contrary to Reason, as I can no way yeild to it. First, let me lay this foundation, that I do acknowledge the Subjects of *England* to be divided into three Estates, the Nobility, the Clergy, and the Commonalty; these are the several Estates of the Kingdom, and the Bishops are part, and the cheif part of one of these, viz. the Clergy: And sometimes these three Estates have joined in some transactions, as 9 *Hen. 5.* in the ratification of a Peace with the King of *France*, *Charles* the Sixth, who had desired it should be so, he having had it ratified in *France* by the three Estates there; the Record saith, *Uolensque idem Serenissimus Dominus noster pro parte sua dictam pacem & omnia & singula contenta in ea modo consimili per ipsum & tres Status Regni sui jurari, firmari & roborari, prout ex dicte pacis tenore astringitur & obligatur, dictam pacem bene & fideliter in omnibus se observaturum in verbo Regis, & ad Sancta Evangelia per ipsum corporaliter tacta juravit & promissit, ac dictos tres Status, viz. Prelatos & Clerum, Nobiles & Pagnates, nec non Communitates dicti Regni sui secundo Maii ad Palatium suum Westmou. ad maiorem firmitatem & robur Pacis predictae fecit congregari, quibus quidem tribus Statibus per Cancellarium suum tenorem dicte Pacis & singulos Articulos ejusdem seriose exponi fecit, &c.* The King willing for his part, that the said Peace, and all the particulars of it should in like manner be sworn to, confirmed, and ratified by Him and the three Estates of his Kingdom, according as he was obliged by the tenour of it to do, did swear and promise, laying his hand upon the holy Evangelists, in the word of a King, that he would well and faithfully observe and keep it in every circumstance; And the said three Estates, to wit, the Prelates and Clergy for one, the Nobles and Great men for another, and the Commons for the third, he caused to come before him the second of May at his Palace of Westminster for the better confirmation and strenghtening of the Peace, to which three Estates he caused his Chancellor to declare what the Peace was, and every Article thereof, &c. Here indeed the Prelates, and all the Clergy together with them, are declared to be one of the three Estates of the Kingdom, which is to be understood as they are assembled in the Convocation, where all are present in their Persons, or their Representatives, but this is no part of the Parliament, nor is it any ways entrusted with the Legislative power, though it assemble in Parliament time. And in 11 *Hen. 7.* the very same Case hapned again, and the three Estates of the Kingdom joined with the King in the Ratification of a Peace with *France*, in the same manner.

But the three Estates of Parliament are clean anonoother thing, Each must have a Negative voice to all that passeth there. If the Major part of the House of Commons be aginst any thing there proposed, there is an end of it, it is rejected. It is the same in the House of Lords, and the Bishops are intermingled with the Temporal Lords in making up that Majority;

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as part of that Majority, whereas were they one of the Estates, reason would they should vote by themselves, separately from the other Lords, which would make another Estate; but they do not only not vote apart by themselves the whole body of them together, but even that body is divided and separated within it self, one part from another. For the two Archbishops give their Votes after all the Nobility have given theirs, and the rest of the Bishops between the Barons and the Viscounts, so that the Barons excepted, all the rest of the Peers, Dukes, Marquesses, Earls, and Viscounts divide the Archbishops from the Bishops: If then they be an Estate, it is an Estate within an Estate, like a Nest of Boxes one within another, which how agreeable it is to reason, let any man judge.

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Besides, would it be for the honour of the House of Lords, that two Estates must be put together to keep the ballance even with the House of Commons, who are but one Estate, and that their two should signifie no more than that one? And most clearly it would be a great disparagement to the Peerage of the Kingdom, the Temporal Lords, and would make them to be a poor Estate, that another Estate must be joyned to them, to make up their Negative voice, and set them upon even ground with the House of Commons.

But this is further to be said, were the Bishops one of the Three Estates, a Parliament could not be held without them, no Law, no Act of Parliament could be made, if the Major part of the Bench of Bishops did not agree to it; but we know it to be otherwise in point of fact. Parliaments have sate without a Bishop, and Acts of Parliament have been made, the Bishops dissenting; and our Law Books say it may be so in point of Law: That it hath been so, Bishop Jewel acknowledges it in his Defence of the Apology of the Church of England, p. 522. he bids you read the Statutes of Ed. 1. and you will find, that in a Parliament solemnly holden by him at St. Edmunds-Bury, the Archbishops and Bishops were quite shut forth; and yet the Parliament held on, and good and wholsom Laws were there enacted, the Record saying, *Habito Rex cum suis Baronibus Parlamento, & Clero excluso, &c.* The King holding a Parliament with his Barons, and excluding the Clergy, &c. Crompton hath this likewise in his Book of Courts under the Title, *Parliament*, p. 19. b. So certainly that King did not believe his Clergy to be a Third Estate of his Parliament, or he would never have left them out: for it must necessarily have followed that his Parliament would have been lame and imperfect: But doubtless he knew the Law to be, as all the Judges of England said it was, in Henry the Eighth's time when the question was, as the Title of the Book-Case runs in Keilway's Reports, p. 180. b. *How Supreme Jurisdiction pertaigne al Roy ou al Pape, To whom the Supreme Jurisdiction belongs, to the King or the Pope?* For that hath still been in competition between the Crown and that Clergy, I mean the Popish Clergy. It is in Dr. Standishe's Case, 7. H. 8. p. 184. b. *Les Justices disoient que nostre Sr. le Roy poit assez bien tener son Parlement per luy & ses Temporal Seigniors & per ses Commons, tout sans les Spirituals Seigniors, car les Spiritual Seigniors nout aucun place en le Parlement chamber per reason de leur Spiritualite, mais seulement per reason de leur Temporal possessions, The Judges said, That our Lord the King might well enough hold his Parliament by himself and the Lords Temporal and his Commons, wholly without Lords Spiritual, for the Lords Spiritual have no place in Parliament by reason of their Spirituality, but by reason of their Temporal possessions; that is, holding their Lands, their Temporal possessions in nature of Baronies, sicut Baroniam, as it is in the Constitutions of Clarendon, not that they were truly and really Barons, ennobled in blood, but by their Tenure of such Land dignified to sit in Parliament, and the King service there, as the Temporal Lords by their Tenure were bound to do.*

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For this was the Policy of William the First, he divided all the Land's that were escheated to him by his conquest, into so many Knights Fees, and so many Knights Fees he erected into a Baronie; the Temporalities of Bishops likewise, and so of many Abbeys and Priors he erected

into Baronies, all to hold of him *in Capite*, and upon account of those Baronies both the Temporal Lords and the Spiritual Lords, not only Bishops, but also those Abbots and Priors had of right, place in Parliament, and were bound to serve him there: Now, I would ask if they all holding by one Tenure, and by that Tenure sitting in Parliament could possibly be imagined to be two different Estates? Certainly, they could not be then two different Estates, for they were all Feodal Barons; And what hath since hapned to make a difference? The change hath been only this; The Temporal Lords holding so by their Tenure grew so numerous, that King *John* put them into two ranks, of *Barones Majores*, and *Barones Minores*, and only the *Majores* had Writs of Sammons to come to Parliament. Afterwards in *Richard* the Second's time Barons were created by Patent, and so had Place and Vote in Parliament. I ask now, If it be probable, nay, if it be possible, that this should alter the Constitution of Parliament, that that House which before consisted but of one of the Estates, should now be divided into two Estates. They are still qualified to be Members of Parliament as before, a Baron as a Baron, an Earl as an Earl; Being made by Patent, or by Writ, or by holding such a proportion of Land, alters not the case as to their sitting in Parliament, for it is being of such a degree, which makes them Peers of Parliament, how they rose to that degree, is not material. And what should make the Lords Spiritual, who have received no change in their being called to be Members of that House, to be now an Estate by themselves, which they were not before? I profess I see not the least colour of reason to think there should be any change, but as they were in the beginning, so they are still, no other than Fellow Members of that House with the Temporal Lords, and together make up one House.

But this is also to be considered, That if the Bishops were a Third Estate of Parliament, not only the Parliament could not be held without them, but nothing could pass in Parliament, that at least the Major part of them should not assent to: But so far from that, not only what we find in the Journals of former times, but daily experience tells us, that *Acts* have passed not only when the Major part of that Bench was against them, but many times when the whole Bench was strongly of another mind.

20 R. 2. The Bishops upon occasion of the Statute of Provisors enter a Protestation *against whatsoever should be done in derogation or restriction of the power of their Holy Father the Pope, saying, They were sworn to his Holiness, and to the Court of Rome*: These were likely to make a good Third Estate of an *English* Parliament: And is it not then a wonder that any *English* man should desire to bring Popery in again, for Bishops to controul both King and Parliament? Would it not set even Monarchy itself one degree lower? Sure it would: But this is by the way. Consider further, That if they had had such a power of being a Third Estate in the days of Queen *Elizabeth*, those good Acts for a Reformation in Religion had never passed, and the Reformation had never been. 1 *Eliz.* The Bill for restoring the First-Fruits and Tenth to the Imperial Crown of *England*, which passed *February* 4. The Bill for restoring the Supremacy to the Crown, and Repealing divers Acts made to the contrary, which passed *March* 18. The Bill giving authority to the Queen upon avoidance of a Bishoprick to take some part of the Temporalities into her hands, recompensing the same with Improprate Parsonages, which passed *April* 7. All the Bishops present were against the passing of these Bills. And before that, in *Edward* the Sixth's time, they were against the Bill for Priests to marry, which passed *Febr.* 19. 2 *E. 6.* So the Bill for ordering Ecclesiastical Ministers, giving power to Six Prelates, and Six other men learned in the Laws, to set down the form and manner of their Consecration, which passed *Jan.* 25. 3 *E. 6.* The Bill for nominating Thirty two Persons to peruse the Ecclesiastical Laws, which passed *Jan.* 31. The Bill for abolishing and putting away divers superstitious Books, as Legends, Missals, Processionals, and the like, and taking away Images out of Churches and Chappels, which passed also that Parliament. All these

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107.

these good Bills the Bishops were against, yet they passed into Laws, and were the foundation of our Reformation; which, had they been a Third Estate, had never been laid, for those Bills had not passed. But you will say, perhaps, that we need not fear such mischiefs and inconvenience from our Protestant Bishops, and I grant it, nor do I urge these things with any such apprehension; I only shew you what the Popish Bishops did then, and that if they had been a Third Estate, such mischiefs would have followed upon it, and thence to infer, That they were not in those times so accounted, and that our Protestant Bishops cannot then pretend to it now, They then, and These now having Place and Vote in Parliament upon the same terms.

But then we have good Authority to inform us which are truly the Three Estates: King James seems to make it clear in a Speech he made at the Prorogation of the Parliament in the year 1605. the words are these, *As for the thing it self (that is, the Parliament) it is composed of a Head and a Body; The Head is the King, the Body are the Members of the Parliament; This Body again is subdivided into two parts, the Upper and the Lower House. The Upper House compounded partly of Nobility, Temporal Men, who are Heritable Counsellors to the High Court of Parliament by the honour of their Creation and Lauds; And partly of Bishops, Spiritual Men, who are likewise by the virtue of their Place and Dignity Counsellours, Life Renters, or Advitam of this Court. The other House is composed of Knights for the Shires and Gentry, and Burgeses for the Towns. But because the number would be infinite for all the Gentlemen and Burgeses to be present at every Parliament, therefore a certain number is selected and chosen out of the great Body, serving only for that Parliament, where their Persons are the Representation of that Body. You see that wise King makes the Body to consist of Two Parts, the Upper House, or the House of Lords to be one of those parts, consisting of Lords Temporal, and Lords Spiritual, who together make one part; And the House of Commons another part: It is true, he calls neither of them an Estate, but most certain he cannot be thought to understand the Spiritual Lords to be Estate by themselves, making them to be but a Part of one of the Parts of that Body: For by the same reason he may be said to make the House of Commons consist of two Estates, saying, it is composed of Knights of the Shires, and Burgeses for the Towns. But King Charles the First is plainer in his exprellions, in his Answer to the Nineteen Propositions sent to him from the Two Houses, June 2. 1642. He tells them, *That neither one Estate should transact what is proper for two, nor two what is proper for three.* And in that same Answer he saith a little after, *It is most unreasonable that two Estates proposing something to the Third, the Third should be bound to take no advice whether it were fit to pass, but from these two, who did propose it.* Nothing can be clearer than this, to shew what the Opinion of that good King was concerning the Three Estates in Parliament.*

And 2 H4. n. 32. It is so declared by the House of Commons even to the King himself, and to the Lords, *That the Three Estates of Parliament are the King, the Lords Spiritual and Temporal, and the Commons, who should all be at an Unity among themselves, and therefore hearing there were some differences between the Lords, they humbly prayed the King to compose them.*

And Stephen Gardiner Bishop of Winchester, sometime Lord Chancellor, an ancient Parliament-man in Henry the Eighth's time, who well understood the Constitution of Parliament; in his Letter to the Lord Protector in Edward the Sixth's time, which Letter is in the second Volume of the Book of Martyrs, Printed in 1641. p. 7. doth acknowledge it, and saith, *That the Three Estates make a Law, and compares the Three Estates in Parliament to the Three Christian Vertues, Faith, Hope, and Charity, and saith, That it were the same absurdity and untruth to say the Higher House and the Lower House exclude the King in the Office of making Laws, as it would be in Religion to say, that Faith excludeth Charity in the Office of Justification.* Here you have the Testimony of a Bishop: I confess, a Popish Bishop, as you may see by his

vid. gr.  
L. p. 1  
vid. Hu  
181 H

vid. 173

vid.

application of this Simile, to make Charity, (that is, works of Charity) to have a part in Justification. But I meddle not with his Divinity. As to that which he saith of the Estates in Parliament, he is in the right, and he was one that knew well enough what was due to the Order of Bishops, even to the full extent of it, and would not have shortned it the breadth of one hair, yet he makes them not an Estate by themselves, but as joyned with the Lords Temporal.

Then for the Common Law, you have *Finch* in his Book of Law dedicated to King *James*, the first Chapter of the second Book, p. 21. who saith the very same thing in very plain terms: His words are these, *L'assemblée de ceux trois Estates c'est assavoir, Roy, Noblesse, & Commons, qui sont le Corps del Rœalme, est appellee Parlement, & leur decret un Act de Parlement, car sans tous trois (come si soit fait per Roy & Seigniors, mes rien parle del Commons) nest aucun Act de Parlement, The Assembly of the Three Estates, that is to say, King, Nobles, and Commons, who are the Body of the Realm, is called a Parliament, and their Decree is an Act of Parliament; for without all three (as if it were done by the King and Lords, and no mention of the Commons) it is no Act of Parliament. Can any thing be plainer?*

You see now with how little appearance of truth the Writer of that Paper takes upon him to declare Bishops to be either Peers of the Land, or one of the Three Estates, and what ill Topicks he hath chosn to prove them to have right of Judicature in all Cases Criminal and Capital; for that is his Assertion upon it.

For what he cites out of some Year-Books, that in some Pleadings their Counsel calls them Peers, will not make them so; nay, should the Judges themselves stile them Peers, as perhaps they might compliment the potent Clergy of those days, it could not alter the Law of the Land, which makes Commoners their Peers, seeing they are to be tried by Commoners.

As for matter of Fact, to prove that they have Judged in Capital Cases, he cites the Protestation in the Eleventh of R. 2. and then their making their Procurator, and so Judging by Proxy in the 21 of R. 2. To which I need say nothing in this Postscript, having so largely in my Letter treated of it.

Then he gives many Precedents of their Voting in Bills of Attainder, which is all Not to the purpose, for that is not in Question. Acts of Attainder are Laws, and every Freeman is supposed to give his Consent to every Law, either by his Representative, or in Person if a Member of Parliament; And Bishops being Members may I think claim to do it Personally.

So I have done with the Paper, and come to the Printed Book, stiled *The Honours of the Lords Spiritual asserted*; And Six Chapters are taken up in blazoning their Honour, which nobody endeavours to take from them, nor do I think it to be any part or degree of Honour, to judge men to death. It is certainly an employment which in my opinion no body will envy to any that hath it. Then for those great Places which the Bishops enjoyed here in *England*, mentioned in the Fifth Chapter, I no ways wonder at it; we know, that Popish Clergy had ambition enough to covet to have the whole rule, and in those blind and superstitious times power enough to obtain what they had a mind to, both Prince and People in a manner awed by them; who yet sometimes would complain, and break out a little, as Scholars sometimes rise against their Schoolmasters. So 45. E. 3. The two Houses joyn, *Comites, Barones & Communes*, and represent to the King, how the Government of the Kingdom had been a long time in the hands of the Clergy, *Per ent grant mischiefs & damages sont avenuz en temps passe & plus purroit eschier en temps avenir at disherison de la Couronne, & grand prejudice du Rœalme, Whereby great mischiefs and damages have happened in times past, and more may fall out in time to come, to the disherison of the Crown, and great prejudice to the Realm; And therefore they humbly pray the King, that he would employ Laymen.* So 20. R. 2.



The Commons complain, *That the King kept so many Bishops about him in his Court, and advanced them and their followers.* Therefore you see it was not always pleasing to the Kingdom : But all this is by the By ; though that Author takes a great deal of pains to enlarge himself upon this Subject, which is not at all to our purpose, nor deciding the point in question one way or other.

In his two last Chapters, the seventh and the eighth only, he toucheth upon it. He first gives this for a Rule, *That it was the common usage and right of the Bishops in ancient times to sit and vote in Parliament in all Cases, as well Criminal as otherwise, either by themselves or their Proxies.* As for their Proxies, as I have already said, it was never done but in one Parliament, which Parliament is repealed, and all that was done in it, of no signification. And besides, as I have already told you in my Letter, if that Parliament had not been repealed, yet that unparliamentary Nonfensical action of the whole Bench of Bishops, and all the Clergy with them, empowering one Man, as they did Sir Thomas Percy, to give one Vote for them all, shews the manifest indispensable unlawfulness of their being Personally present, that rather than that should be, such an Irrational, Unprecedented thing should be admitted of; which is my Answer to all that he saith, and to the Precedent that he quotes out of the 21. of R. 2.

Now let us examin what he saith of their being in Person present at such Trials. He quotes Brompton's Chronicle, reciting among the Laws of King Athelstan this concerning Bishops, I will cite Brompton's words right as they are, *Episcopo iure pertinet omnem rectitudinem promovere, Dei, viz. & seculi, It appertains of right to a Bishop, to promote that which is right both concerning God and the World.* A little after, he saith, *Debet etiam seculo pacem & concordiam operari cum seculi Iudicibus, He ought likewise diligently together with the secular Judges to promote Peace and Concord.* After he saith, *Debent Episcopi cum seculi Iudicibus interesse Iudiciis, ne permittant si possint, ut aliqua pravitarum germina pullulaverint, The Bishops ought to be present in Judgments with the Secular Judges, not to suffer any buds of wickedness to sprout if they can hinder it.* Then he tells you what they must do in their Judgings, see that every man have right, that rich men do not oppress poor men, nor Masters their Servants, and the like, and to look to Weights and Measures, that there be no cozening, nor cheating, but that they may live like Christians. Here is nothing of judging a Capital Crime; far from it.

His next Authority is out of Sir Henry Spelman's Glossary upon the word Comes; there it is, *Comes presidebat foro Comitatus, non solus, sed adfusus Episcopo, hic ut ius divinum, alter ut humanum diceret, alterque alteri auxilio esset & consilio, Presertim Episcopus Comitatus; Nam in hunc illi animadvertere sepe licuit, & errantem cohibere, The Earl did preside in the County Court, not alone, but joyned with the Bishop: He, to deliver what was God's Law; the other, what was Man's Law: And that the one should help and counsel the other; especially the Bishop to do it to the Earl, for it was lawful for him sometimes to reprove the other, and to reduce him, bring him into order if he went astray.* He leaves out what the Bishop's work was, he omits that clause, *Episcopus ut ius Divinum diceret*, for this was not to try Capital Crimes: But Sir Henry Spelman tells us further, *That that Court had cognisance but of petty matters, De causis Magnatum & Potentiorum non cognovit Comes, nam he ad Aulam Regiam deferende, Pauperum tantum & minus potentum iudicabat. Vins & Legibus nostris hodie prohibetur debiti aut injuriarum actiones in Comitatu intendere. Si rei litigate valor non sit minor 40 solidis, The Earl hath not cognisance of great mens business, for such matters are to be brought into the King's Courts, he only judges poor mens Causes. Hence it is, that by our Law, Actions for Debt and Trespasses are not to be commenced in the County Court, if it be for above the value of 40 Shillings.* Judge now I pray you, what all this makes to prove that Bishops have

have right to judge of Treason, Felony, and those transcendent Crimes which deserve death.

He then quotes Mr. Selden, and makes him say, in his Introduction to his Treatise of the Privileges of the Barons of England, that *Omnes Prelati & Magnates* had this Privilege till the Prelates lost it by the Parliament of 17. Car. 1. I find no such thing there, he saith, That the Prelacy had heretofore the first place in the Summons, but that they had then lost it. And this I observe further, that Mr. Selden makes the whole upper House to be but one Estate, whether the Bishops be there or No; It was one Estate formerly when the Bishops had the Privilege of sitting there, and when they had the first place in the Summons, and it was one Estate then in Mr. Selden's time, when they had lost that Privilege, but our Assessor in the Printed Paper would take no notice of this.

Now I come to his Precedents, he first begins with their Proxies, and cites many Parliaments where Bishops gave Proxies, which no man denies, and they do it still, only they give their Proxies now only to Bishops like themselves, who are Members of the House, not to such as are no Members, as it seems they did then: But giving Proxies to represent the whole Bench of Bishops, or any one Bishop in any Judgment of death, except in that one Parliament of 21 R. 2. I utterly deny. Indeed he tells us of the 2 H. 4. and 2 H. 5. that they did it there in those Parliaments; but I dare say he cannot find it there, I am sure I cannot; and I do verily believe he never looked there, but that he takes it upon trust out of the Margin of pag. 125. of Mr. Selden's Book of the Privileges of the Baronage, where indeed there is such a quotation, but misplaced by the Printer, having reference to what is said at the end of the Paragraph of Thomas Earl of Salisbury, 2 H. 5. endeavouring to reverse the Attainder of his Father, John Earl of Salisbury, who was attainted 2 H. 4. and not at all concerning what is said of Proxies in the first part of the Paragraph, as our Assessor would here apply it.

Then he cites a Precedent or two to make out that Bishops were personally present at the giving of some Judgments of Death; which if they be truly related, he saith something, but I believe they will be found to be of as little weight, as all he said before: His first is among the Pleas of the Crown, 21 R. 2. of the Impeachment, as he calls it, of the Earl of Arundel, and others, by the Lords Appellants, the Earls of Rutland, Kent, Huntington, and others. He saith the Earl of Arundel being brought to the Bar by the Lord Nevil, Constable of the Tower, that the Articles exhibited against him by the Lords Appellants were read, to which he only pleaded two Pardons, which Pardons not allowed, the Lords Appellants demanded Judgment against him: *Whereupon the Lord Steward, by the Assent of the King, Bishops, and Lords, adjudged the said Earl guilty, and Convict of all the Articles, and thereby a Traitor to the King and Realm, and that he should be therefore Hanged, Drawn and Quartered.* This our Assessor saith, who quotes Sir Robert Cotton's Collections for it, and there indeed it is so, but methinks one should not venture to quote a Record upon any man's Allegation, without consulting the Record it self, and that I am sure he hath not done; for it saith expressly, that it was only the Lords Temporal and Sir Thomas Percy, Proctor for the Prelates, that gave that Judgment. The words of the Record are, *Sur quoy le dit Duc de Lancaster per commandement du Roy & toutz les Hrs. Temporels & Mr. Thomas Percy aiant poair sufficient des Prelatz & Clergie du Roialme d'Engleterre come piere de Record en le dit Parlement per assent du Roy agarderent le dit Comte d'Arundel coupable & convict de toutz les pointz dount il est appellez, & per taunt luy asuggerent Traitour au Roy & au Roialme, & qu'il soit treuvez, penduz, decolliez & quarterez, Whereupon the said Duke of Lancaster, by the King's Command, and all the Lords Temporal, and Sir Thomas Percy being sufficiently empowered by the Bishops and Clergy of the Kingdom of England, as appears upon Record in the said Parliament, did by the King's assent declare the said Earl of Arundel guilty and convict of all the points of which he was accused, and therefore did adjudge him a Traitor to the King and Realm, and that he should be drawn, hanged, his head*

head cut off, and body quartered. You see the Bishops were none of them present, but their Procurator was, to which in my Letter I have largely spoken, and need not repeat it here.

He urges also a Precedent in this same *Parliament*, of the Commons by the mouth of their Speaker Sir *John Bussy*, praying the King, That for that divers Judgments were heretofore undone, for that the Clergy were not present, that the Clergy would appoint some to be their Common Proctor, with sufficient authority thereunto. I have already shewed, that this whole *Parliament* was repealed, for the extravagant things that were done in it, of which this was one: And therefore nothing that was then done can signifie any thing to be a leading Case any ways to be followed. And this as little as any, except it could be made appear, which I am confident it cannot, that some Judgment had been reversed upon that account because the Prelates were not present, and had not given their Assent to it. Indeed 2. H. 5. *Thomas Montacute*, Earl of *Salisbury*, attempted it, brought his Writ of Error to reverse the Judgment given. 2. H. 4. against his Father, *John Earl of Salisbury*, and did assign that for an Error as the Record saith, Item Error de ceo que le dit John susdit Count dunt forfaire terres & tenements sans assent des Prelates, qui sont Piers en Parlement les queur ne furent mye faits parties as Declaration & Juggementz abandits, Item, An Error in this, that the foresaid Earl John should forfeit Lands and Tenements the Prelates not assenting, who are Peers of Parliament, yet were not at all made Parties to the abovesaid Declaration and Judgments. But this was adjudged to be no Error, and the Condemnation of his Father to have been Just and Legal: And I am very confident, that this is the only Precedent of such an Attempt, and yet it makes a stronger argument against it, that it was endeavoured, and rejected, for now it is a Judged Case. And besides, as I have already observed, this desire of the Commons, of their making a Proctor, shews what the Opinion of those Times was, That the Bishops could not be personally present at such Judgments; which is all that is now in question between us.

His next Precedent is 3 H. 5. when *Rich. Earl of Cambridge*, and others were tried for Treason for levying War against the King, the Bishops then personally sitting in Parliament, as he saith, and he bids us see the Record in the *Tower*, which I dare say he had not done himself, for then he would have found it contrary to what he asserts, That *Richard Earl of Cambridge*, and *Henry Lord Scroope* with him were not Tried nor Condemned in Parliament as he saith they were, but by a special Commission directed to the Duke of *Clarence*, and other their Peers, Earls, and Barons at *Southampton*, and were there Condemned and Executed; but the whole Proceedings against them were afterwards brought into *Parliament* at the desire of the Commons, and were there at their desire likewise ratified and confirmed, and the Bishops then were and might be present, for I look upon it as an Act of Parliament, yet not attainting them, but confirming their Attainder; for they were Convicted, Condemned, and Attainted before at *Southampton*.

His last Chapter of Precedents from H. 8. to the 29. *Eliz* is only of Bills of Attainder, and so acknowledged by him, and therefore Nothing to the purpose. As I have said before, those Bills are Laws, though Private Laws, whereto every Freeman of *England* doth consent, either in Person or Represented; and Bishops are or should be all present at the passing of them, for then they act as Members of the House of Lords in their Legislative capacity: But for their being Judges in any Trial of Life and Death, or part of a Trial, when the House proceeds in a Judicial way, I see no reason by all that hath been said on the other side, to change my opinion, That they ought not. Sir, you see what is said on both sides, be you Judge, who is in the right.